

EXHIBIT 7

Marti Licon-Vitale

Volume I

5/21/2020

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 CIVIL ACTION NO. 1:20-civ-03315 (ER)
4 -----x
5 CESAR FERNANDEZ-RODRIGUEZ, ROBER GALVEZ-CHIMBO,
6 SHARON HATCHER, JONATHAN MEDINA, and JAMES
7 WOODSON, individually and on behalf of all others
8 similarly situated,
9 Petitioners,
10 v.
11 MARTI LICON-VITALE, in her official capacity as
12 Warden of the Metropolitan Correctional Center,
13 Respondent.
14 -----x
15 Remote Deposition
16 May 32, 2020
17 10:09 a.m.
18
19 DEPOSITION VIA VIDEOCONFERENCE OF
20 MARTI LICON-VITALE
21
22
23 lipka.com, inc.
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25 transcripts@lipka.com

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1 hadn't had any visitation, legal or social, for --
2 probably since February 28th.

3 Q. And was that other issue the
4 incident involving a correctional officer who
5 reportedly brought a loaded gun into the facility?

6 MR. OESTERICH: Objection.

7 A. It was involving the possibility of
8 an introduction of contraband.

9 Q. Was it a loaded gun?

10 A. Yes, it was a loaded gun.

11 Q. In addition to that, had anything
12 been done as of March 1st to plan for COVID-19?

13 MR. OESTERICH: Objection.

14 A. Not that I'm aware of.

15 Q. Let's move forward to approximately
16 the middle of March, again of this year. At that
17 time had the MCC done anything to prepare for
18 dealing with COVID-19?

19 A. We had begun the enhanced screening
20 at our staff entrance sites.

21 Q. Anything else?

22 A. I believe we had already begun
23 passing out PPE --

24 Q. Okay.

25 A. -- to our staff.

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1 Q. Meaning the nine who were in the
2 cell with the person from the MDC?

3 A. Correct.

4 Q. Other than those nine, were any
5 inmates at the MCC being screened prior to on or
6 about March 23rd when you had your first positive
7 COVID-19 inmate?

8 A. Prior to, no.

9 Q. And the staff were given PPE, as of
10 the middle of March staff were given PPE. Was
11 that all staff?

12 A. That was staff who were working in
13 areas that had inmates who were quarantined or
14 were isolated.

15 Q. As of the middle of March, was there
16 any testing protocol in place at that time?

17 A. There was no testing protocol in
18 place at the institution. When an inmate had
19 symptoms, we would take them out to the hospital
20 to be tested there.

21 Q. As of the middle of March, did the
22 MCC have any testing equipment within the
23 facility?

24 A. I don't believe we had any tests
25 available.

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1 I don't know a specific date.

2 **Q. What location in the facility?**

3 A. There's a unit on the 3rd floor that
4 was available.

5 **Q. What unit?**

6 A. Unit C. I think we call it Unit C
7 on the 3rd floor.

8 **Q. As of the middle of March, did the**
9 **MCC know where it was going to place inmates who**
10 **were symptomatic for COVID-19 but had not yet**
11 **tested positive?**

12 A. I can't say that we knew at that
13 date where we were going to place them.

14 **Q. Was there ever consideration given**
15 **to transferring inmates from the MCC to another**
16 **facility as a response to COVID-19? And what I'm**
17 **focusing on at the moment is March.**

18 MR. OESTERICH: Objection. Asked
19 and answered.

20 THE WITNESS: I can't answer or can?

21 MR. OESTERICH: Can.

22 A. We were making an attempt to move
23 inmates but then as, you know, as the COVID
24 direction kept moving forward because it was very
25 fluid, we stopped the attempt to move inmates to

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1 consideration inmates who had high blood pressure.

2 Q. Any other reasons why it went from
3 23 to whatever higher number was arrived at?

4 A. I think diabetes was another
5 criteria that we had not necessarily taken into
6 account.

7 Q. Any others other than those two?

8 A. Not that I remember.

9 Q. So rolling forward a little bit,
10 going back to that March 20th conference hosted by
11 Chief Judge McMahon, do you know as of that time
12 approximately how many masks the MCC had?

13 A. No, I don't remember.

14 Q. Did you tell Chief Judge McMahon
15 during that conference that the MCC had a total of
16 130 masks?

17 A. 130 sounds familiar for the N-95.

18 Q. Did you tell Chief Judge McMahon
19 during that conference that the MCC at that time,
20 March 20th, had 30 N-95's and 100 surgical masks
21 for a total of 130? Did you tell her that in
22 substance?

23 A. I may have. I don't remember.

24 Q. Do you have any reason to dispute
25 that?

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1 MR. OESTERICH: Objection.

2 A. No.

3 Q. Did you tell Chief Judge McMahon at
4 that conference that the use of gloves by staff
5 was optional?

6 A. Yes.

7 Q. Did you tell Chief Judge McMahon at
8 that conference that the MCC was not screening
9 inmates for COVID-19 symptoms other than new
10 arrivals to the facility? Did you tell her that
11 in substance?

12 A. I may have, yes.

13 Q. Any reason to dispute that?

14 MR. OESTERICH: Objection.

15 A. No.

16 Q. Can you tell me what the MCC did to
17 acquire testing equipment or supplies? In other
18 words, who did what, when, to get testing
19 equipment?

20 A. At any point do you mean?

21 Q. Yes. Well, let me do it this way.
22 We've been told in response to our interrogatory
23 requests in this case that the first test kits
24 were ordered by the MCC on April 10th. Do you
25 agree with that?

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1 A. No.

2 Q. When does the MCC plan to start
3 using the Abbott test machine?

4 A. We've already started.

5 Q. When?

6 A. Two days ago.

7 Q. How many people have been tested so
8 far?

9 A. We've tested one inmate who came
10 into the institution.

11 Q. Anybody else?

12 A. No.

13 Q. Just so I have this, four an hour,
14 results in how many a day?

15 A. 15 -- for four an hour, you get
16 results in 15 minutes.

17 Q. So how many people a day could you
18 test if you chose to use the machine to maximum
19 capacity?

20 A. I guess four an hour all day long.

21 Q. I guess what I'm saying, Warden, is
22 how many hours do you have staff that could
23 administer the test to inmates?

24 A. So we have medical staff available
25 beginning at 6:00 a.m. and I think they're here

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1 there were 786 inmates at the MCC.

2 A. Okay.

3 Q. Is it fair to say that if you take
4 that number and add on new arrivals, you're
5 somewhere in the neighborhood of 800 inmates who
6 have been at the facility since March 1st?

7 A. Yes.

8 Q. So less than 1 percent of the MCC
9 inmate population since March 1st have tested
10 positive; correct?

11 A. Correct.

12 Q. And do you have an explanation for
13 the difference in the two percentages we've just
14 identified, over 20 percent positives for staff,
15 less than 1 percent positives for inmates?

16 MR. OESTERICH: Objection.

17 A. Testing was not available.

18 Q. And do you know how many inmates in
19 total were tested or have been tested?

20 A. I think 11.

21 Q. Your letter to Chief Judge Mauskopf
22 from Tuesday says 10. Would you accept that?

23 A. Well, I guess I'm --

24 Q. I'm sorry, I apologize. Finish.

25 A. At one point we did have an

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1 additional inmate that we tested with the Abbott
2 machine.

3 Q. In the last two days?

4 A. Yes.

5 Q. So five out of 11, so that's close
6 to 50 percent of the inmate population that has
7 been tested have tested positive; correct?

8 A. Okay, yes.

9 Q. Do you have any estimate of how many
10 inmates would have tested positive for COVID-19
11 had they all been tested? Do you have any
12 estimate of that?

13 MR. OESTERICH: Objection.

14 A. I do not.

15 Q. Have you discussed that with anybody
16 at the MCC since the beginning of March, meaning
17 "I wonder how many inmates we would have positive
18 if we tested them all"? Has that been discussed
19 in sum or substance with anybody at the MCC?

20 MR. OESTERICH: Objection to the
21 extent --

22 A. No.

23 MR. OESTERICH: She answered no
24 but to the extent you were consulting
25 lawyers, that's objectionable.

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1 Q. Do you agree with the general
2 proposition that the more people you test, the
3 more positive results you're going to get? Do
4 you?

5 A. Yes.

6 MR. VINEGRAD: That was a serious
7 question for reasons that, Jeff, you're
8 probably aware of.

9 Q. The screening of inmates, as of
10 March -- in March, what was done to screen inmates
11 for COVID-19?

12 A. In reference to once an inmate has
13 symptoms?

14 Q. In other words, let me do this. If
15 an inmate was screened -- we talked before about
16 the classes of inmates who were screened.

17 I'm now asking a different question.
18 I'm talking about the screening process, itself.
19 Are you with me?

20 A. Okay. The medical staff.

21 Q. Yes. What did the screening consist
22 of?

23 A. Okay. The screening consisted of
24 taking the inmates' temperature and asking them
25 the same questions that we were asking the staff

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1 A. I can't tell you -- my assumption
2 would be that the correctional officer collects
3 the cop-outs. Once medical comes, they would hand
4 them to the medical staff at that point.

5 **Q. Are they retained?**

6 A. I don't know.

7 **Q. Are you aware that the medical**
8 **cop-outs were being shredded until earlier this**
9 **month?**

10 MR. OESTERICH: Objection.

11 A. No.

12 **Q. Is this the first you're hearing**
13 **that?**

14 A. It's the first I hear that it's
15 happening here.

16 **Q. Here, MCC, until early May. Is this**
17 **the first time you're hearing that?**

18 A. Yes, it is.

19 **Q. Do you know why that was happening?**

20 MR. OESTERICH: Objection.

21 A. I am not aware that we were doing
22 medical cop-outs on paper. Our medical cop-outs
23 are electronic, and those can't be shredded.

24 **Q. This lawsuit was brought on April**
25 **28th. Does that sound right?**

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1 A. I don't know.

2 Q. Would you agree with me that that is
3 not the appropriate lapse of time for somebody who
4 reports, "I need medical help. I'm suffering from
5 these symptoms, these are COVID-19 symptoms," and
6 a response two weeks later? Would you agree with
7 me that that is not appropriate?

8 A. I would agree.

9 Q. As far as you know, how long is it
10 after an inmate is determined to have COVID-19
11 symptoms that they're isolated? How long after
12 it's first determined that they have those
13 symptoms are they isolated?

14 A. They're isolated immediately.

15 Q. Do you have any explanation for the
16 accounts of inmates who have waited for one to two
17 weeks in between the time they recorded having
18 COVID-19 symptoms and the time that they were
19 isolated?

20 Do you have any explanation for that?

21 MR. OESTERICH: Objection.

22 A. No.

23 Q. Do you agree that that is not an
24 appropriate passage of time?

25 A. That is not an appropriate passage

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1 of time, I agree.

2 Q. Is there any effort to track the
3 medical condition of inmates who are symptomatic
4 for COVID-19 at any point after they're first
5 treated?

6 MR. OESTERICH: Objection.

7 Q. Do they get follow-on treatment?

8 A. Can you repeat the beginning of that
9 question?

10 Q. I'll repeat the whole question.

11 After an inmate who is symptomatic
12 for COVID-19 is determined to have recovered, is
13 there any follow-on checking or treatment to see
14 if they are, in fact, now healthy?

15 A. I don't know.

16 Q. Why was the SHU used to isolate
17 inmates who were determined to have COVID-19?

18 A. Initially because it was the easiest
19 place to make an entire range available so that we
20 would only be placing symptomatic inmates in
21 there, which was for approximately one week.

22 Q. And it was one week what, that the
23 SHU was used?

24 A. Correct.

25 Q. And the SHU, just for the record, I

1 know you know this, that is the place which
2 typically is used for disciplinary reasons,
3 correct, for inmates?

4 A. It's the special housing units. We
5 place disciplinary inmates in there and we also
6 place inmates who are pending discipline or are
7 being protected.

8 Q. For the first two of those three
9 categories, though, basically if an inmate does
10 something bad or is being investigated for doing
11 something bad, they go to the SHU; right?

12 A. Yes, or are being investigated for
13 possibly needing protection.

14 Q. Is it fair to say that the
15 conditions for the inmates in the SHU are not as
16 favorable as conditions in an ordinary cell in the
17 facility?

18 A. That is true.

19 Q. Was there any effort made to explain
20 to inmates at the MCC that if they were going to
21 be sent to the SHU because of COVID-19, that it
22 was for their own health and safety and should not
23 be viewed as a form of punishment?

24 MR. OESTERICH: Objection.

25 A. Yes.

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1 **Q. How do you know that?**

2 A. Because they should have been
3 proceeded with a detention order indicating on the
4 detention order why they were being placed in the
5 housing unit.

6 **Q. And do you know if that, in fact,**
7 **happened?**

8 A. I don't know if, in fact, it
9 happened. It is our procedure.

10 **Q. Do you know what, in fact,**
11 **correction officers were telling inmates who were**
12 **symptomatic for COVID-19 about going to the SHU?**
13 **Do you know what was actually happening with that?**

14 A. No. I wasn't there.

15 **Q. Was there any effort made to improve**
16 **the conditions in the SHU for the inmates who were**
17 **sent there because of COVID-19?**

18 A. No.

19 **Q. Do you agree that that would have**
20 **been appropriate to do for those inmates, these**
21 **non-disciplinary inmates who were sent there for**
22 **medical reasons?**

23 A. Well, they were celled alone which
24 is an improvement from having to share a cell.
25 For the most part, if they were isolated, it was a

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1 when, I can't tell you who.

2 Q. Or why?

3 A. Or why.

4 Q. The inmates who have COVID-19 risk
5 factors, you understand what that means?

6 A. I'm assuming that that means
7 individuals who have already have high-risk
8 factors to begin with.

9 Q. Right.

10 A. Okay.

11 Q. You know what those are as
12 pronounced by the CDC, are you generally familiar?

13 A. I think I'm familiar.

14 Q. That group of inmates, were they
15 quarantined?

16 MR. OESTERICH: Objection.

17 A. They weren't -- the group was moved
18 to 11 South for the most part prior to the COVID.
19 They were quarantined, yes, in 11 South, yes.

20 Q. And then at some point, it was
21 determined that there were one or more inmates
22 from 11 South who actually tested positive for
23 COVID-19; am I right?

24 A. Yes.

25 Q. Did the remaining inmates on 11

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1 South remain in that unit?

2 A. Yes.

3 Q. Are you familiar with the general
4 COVID-19 protocol for social distancing?

5 A. Yes.

6 Q. Are there locations within the MCC
7 in which inmates are not able to practice social
8 distancing?

9 A. Because of the six-foot rule do you
10 mean?

11 Q. Yes.

12 A. 11 South can be difficult. That's
13 why they're provided with masks and informed to
14 wash their hands continually.

15 Q. And when were they first provided
16 with masks, approximately when?

17 A. Maybe March -- the week of March --
18 the end of March I guess.

19 Q. And what type of masks were they
20 provided at that time?

21 A. Surgical masks.

22 Q. And how many?

23 A. At the time I don't know if it was
24 one or two.

25 Q. Were they paper masks?

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1 A. They were surgical masks.

2 Q. Were they able to be washed and
3 reused?

4 A. Those could not be washed, no.

5 Q. When was the first time that inmates
6 were given masks that could be washed and reused?

7 A. I can't give you a specific date. I
8 think it was prior to me going out. It was prior
9 to me going out. I can't give you a date but it
10 was prior to April 5th.

11 Q. About how long before you went out
12 did that happen?

13 A. I don't recall.

14 Q. What are the other open dorm
15 areas in the facility other than 11 South?

16 A. Only 11 South.

17 Q. The only one?

18 A. Yes.

19 Q. As of the time that you went out,
20 early April, how much soap were inmates given?

21 A. Inmates are either able to purchase
22 their soap or they're provided with soap. I don't
23 know how often.

24 Q. How much soap and how often were
25 they provided it before you went out? Do you

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1 aware.

2 Q. Are you aware of reports by inmates
3 who have stated that they have seen MCC staff not
4 wearing PPE?

5 A. Say that again.

6 Q. Are you aware of reports of inmates
7 who have stated that they have seen MCC staff not
8 wearing PPE?

9 A. I'm not aware of inmates stating
10 that.

11 Q. Are you aware of anybody stating
12 that?

13 A. I know that when I walk around, if
14 someone is maybe not wearing a mask or they have
15 it down or they have it up here, I always tell
16 them that "You need to properly wear your mask."
17 They're uncomfortable, it's hard to breathe and if
18 I just happened to come at the wrong time where
19 maybe they're just trying to catch some air, I
20 have to remind them. It doesn't happen often.
21 It's been on maybe one or two occasions.

22 Q. Beyond that, have you heard from
23 anybody that inmates have stated that they have
24 seen staff not wearing PPE?

25 A. No.

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1 MR. OESTERICH: Objection.

2 A. Sure.

3 Q. It makes a difficult experience all
4 that much more difficult and inhumane; fair?

5 MR. OESTERICH: Objection.

6 A. I guess it's bi-fold in that it is
7 fair to say that. However, if inmates followed
8 the rules and threw their food away once they're
9 done with their meal, that would prevent the, I
10 guess, the number of vermin that we have.

11 Q. It would prevent it?

12 A. Prevent it -- it would definitely --
13 it would reduce it. We now have a building next
14 door that is empty, has no food in it. It's dark.
15 I walked in simply because it's our building and I
16 needed to see it. There aren't any rats in there.
17 There's no food.

18 Q. How is it that you're saying that
19 it's inmates who leave food as opposed to anything
20 else that could be happening to contribute to the
21 prevalence of vermin in the jail?

22 A. Because that's what I see.

23 Q. What do you do when you see that?

24 A. I pretty much -- I walk around with
25 a trash bag. I walk around with a trash bag. I

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1 disclose any confidential communications
2 with your attorney.

3 Q. I'm asking for your position,
4 Warden. Did you support that request or oppose
5 that request?

6 MR. OESTERICH: Objection.

7 A. Ask me the question again.

8 Q. Did you support the petitioners'
9 request in this case to be able to have
10 representatives of theirs inspect the MCC?

11 MR. OESTERICH: The same
12 objection.

13 A. I opposed it.

14 Q. Why?

15 A. Because it would take time away from
16 the staff that have other duties, to walk staff
17 around.

18 Q. Once you learned that the Court had
19 ordered the inspection, what, if any, steps did
20 you take as a result?

21 A. Actually, we didn't take any
22 additional steps because, as I mentioned earlier,
23 we had already had the cleaning company come in.
24 They had already started working on cleaning the
25 first floor.

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1 When we saw that they were doing a
2 great job, we started enlisting them to go to the
3 other floors to strip those floors down, wax them
4 down, and this all occurred prior to knowing of
5 any visitation.

6 So to say steps taken into place --
7 there were things that are just being done in
8 order to just increase the sanitation of this
9 institution because that's what it should be.
10 It's not because someone is coming over.

11 **Q. Are there records that document when**
12 **the cleaning company came in and performed**
13 **cleaning services on the other floors, not the**
14 **first floor?**

15 A. We do have a record because they --
16 we would have to inform our correctional services
17 staff that they would be here and that they would
18 be going to the different floors and to allow them
19 to go to the floors. So we do have documentation,
20 yes.

21 REQ MR. VINEGRAD: Jeff, I request that
22 documentation.

23 MR. OESTERICH: Put it in
24 writing.

25 **Q. Were any steps taken within the**

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1 facility to prepare for the inspection, once you
2 learned that the judge had ordered it, other than
3 what you just testified to?

4 A. Anytime someone is going to come to
5 the facility, we are going -- it's like someone
6 coming to your house. You're going to make sure
7 that, you know, your bed is made, you vacuumed the
8 floor and the dishes are in not in the machine.

9 So we didn't do anything different
10 with this visit than we would have if I knew that
11 my boss was coming or if my director was coming to
12 the institution.

13 Q. Was anything done relating to
14 COVID-19 in particular to prepare for the
15 inspection?

16 A. Not for the inspection, no.
17 Whatever we were doing for COVID, we were doing
18 for COVID and not for the inspection.

19 Q. Do you know if anybody else in the
20 facility took any steps with respect to the
21 condition of the facility, again, in response to
22 the fact that there was going to be a court
23 ordered inspection?

24 A. I became aware that there were
25 additional signs that were put up, but it wasn't

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1 A. Yes.

2 Q. When did the system go electronic?

3 A. I want to say sometime last year.

4 Q. Got it. So how, if at all, has the
5 time period for evaluating potential referrals for
6 home confinement changed at the MCC due to
7 COVID-19?

8 A. The system is electronic. That just
9 became a priority. There are other things that we
10 no longer have to do because we're not accepting
11 new inmates so we're not having to do all of the
12 orientation and initial classification and
13 providing clothes, and there's a lot of things
14 we're not doing now. So we're able to focus on
15 that and getting those halfway -- those home
16 confinement states requested. I can't tell --
17 give you a time frame of how long it takes. I
18 haven't really been here long enough to assess
19 that.

20 Q. Are you familiar with Attorney
21 General Barr's March 26th and April 3rd memoranda
22 on the topic of home confinement?

23 A. Yes.

24 Q. Are you aware that Attorney General
25 Barr declared that basically there was an

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1 emergency situation that justified the
2 prioritization of home confinement as a measure to
3 deal with COVID-19? Correct?

4 A. Yes.

5 Q. Are you aware that he directed all
6 the institutions within the Federal Bureau of
7 Prisons to focus on that task, meaning determining
8 that there were inmates at the facility who were
9 eligible for referral to home confinement, that
10 that was to be undertaken immediately? Are you
11 aware of that?

12 A. I am aware.

13 Q. And you're aware that he directed
14 that this be done and that time was of the
15 essence? Are you aware that he said that?

16 A. I am aware.

17 Q. And you're aware that he directed
18 that institutions prioritize all at-risk inmates,
19 meaning at risk for COVID-19, and not just inmates
20 who were previously eligible for home confinement?

21 A. Yes.

22 Q. And you're aware as well that the
23 Bureau of Prisons directed that it was imperative
24 to promptly review those inmates for potential
25 referral to home confinement?

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1 A. Yes.

2 Q. And are you aware that that
3 included, according to the Bureau of Prisons
4 directives, reviewing inmates for potential
5 referral to home confinement as a population
6 management strategy?

7 A. Yes.

8 Q. Meaning a way to get inmates out of
9 the facility; right?

10 A. Correct. Correct.

11 Q. A very different situation than had
12 been in place prior to that time with respect to
13 home confinement; correct?

14 A. Correct.

15 Q. These were big changes; correct?

16 A. Correct.

17 Q. And you were being directed by the
18 Attorney General of the United States to implement
19 them immediately; right?

20 MR. OESTERICH: Objection.

21 A. Yes.

22 Q. So tell me as best as you know, what
23 exactly did the MCC do in response to Attorney
24 General Barr's and the Bureau of Prisons'
25 directives, the ones that you've just been

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1 **testifying about for the last couple of minutes?**
2 **Tell me exactly what the MCC did, when they did it**
3 **and who did it.**

4 A. We did not immediately start
5 referring inmates to home confinement because
6 while COVID was an emergency, we also had the
7 emergency of our staffing levels because staff
8 were going out on sick leave.

9 We had -- we had to -- our priority
10 was to ensure that our units were secured and we
11 had to place all staff on housing units in order
12 to assure the security of the institution and of
13 our community. So we did not instantly start
14 using our unit team to process home confinement.

15 I do believe that our CMC started
16 processing our home confinement, and that was not
17 right away either because he also was on the unit
18 and he was actually taken off to start doing that
19 procedure, and as we were able to get more staff
20 in, we were able to start taking the case managers
21 whose responsibility it is to make that
22 preparation to do that.

23 So we did not immediately start
24 preparing home confinement referrals.

25 **Q. When did that process of preparing**

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1 addressing COVID-19 other than what you've already
2 testified to?

3 A. No.

4 Q. Anything about the situation with
5 any of the home confinement referrals? Did you
6 discuss that with him?

7 A. I don't think so.

8 Q. So during the process of reviewing
9 inmates for referral to home confinement -- again,
10 I'm talking about since Attorney General Barr's
11 memos -- are there any considerations that
12 constitute what I'll call automatic disqualifiers,
13 things that automatically render an inmate
14 ineligible?

15 A. We've got to review every case
16 individually. I think, you know, automatically is
17 if it's somebody that is in for murder, I would
18 have to think about it twice before I'd let them
19 back out.

20 Q. Understood, but there's no automatic
21 if you got this particular feature, you can't be
22 sent for home confinement; is that your testimony?

23 A. It really depends because you could
24 have two inmates who are there for sexual
25 exploitation of a minor, and one of them is

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1 electronic and the other one is physical, so I
2 would be more apt to send the electronic person
3 home over the person who was physical.

4 **Q. My question, to be real precise, is,**
5 **is there any particular factor, that that one**
6 **particular factor means that they cannot be**
7 **referred for home confinement?**

8 MR. OESTERICH: Objection.

9 A. Not anything that is coming to my
10 head. I have to look at the individual as a
11 whole.

12 **Q. Right.**

13 A. There's more factors than one that
14 we have to look at.

15 **Q. Understood. I'm just asking if**
16 **there's any one factor or factors that are**
17 **automatic disqualifiers regardless of what else we**
18 **know about the inmate.**

19 A. Probably severe violence.

20 **Q. Any others?**

21 A. Severe violence. Nothing else I
22 could think of.

23 **Q. And do you know how many inmates**
24 **have been considered for potential referral for**
25 **home confinement at the MCC since Attorney General**

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1 **Barr's memo?**

2 A. I don't have that number.

3 **Q. So we've been told by your attorneys**
4 **in this lawsuit that as of last Friday, there were**
5 **117 inmates that had been considered. Does that**
6 **sound about right to you based on what you know**
7 **about that process?**

8 MR. OESTERICH: Objection.

9 A. I have no knowledge of how many had
10 been referred.

11 **Q. Have you seen any summary charts or**
12 **anything like any documents that kind of set forth**
13 **like here is the people who have been considered**
14 **and here's what we decided, anything like that?**

15 A. I have, and your number is higher in
16 that what I have looked at is a fluid data,
17 electronic data, that is not necessarily going to
18 be updated. So that's the only thing I've seen.

19 **Q. You have the exhibits right there,**
20 **right?**

21 A. Yes.

22 **Q. Can you take Exhibit 8.**

23 A. Okay.

24 **Q. Have you seen that document before?**

25 A. No. This stack of documentation was

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1 handed to me this morning.

2 Q. So you've never seen it before this
3 morning?

4 A. No.

5 Q. That's a document that was provided
6 to us by your lawyers in this case to reflect the
7 status of the inmates who were considered for home
8 confinement. Are you looking at the right
9 exhibit, Warden?

10 A. Yes.

11 Q. You have that chart, right?
12 Litigation number, status, reason for
13 ineligibility, do you see that?

14 A. Yes.

15 Q. So there's -- I believe there's 117,
16 do you accept that representation, inmates on this
17 list? 13 is there twice, but it's 117. That's
18 where I'm coming up with that number just to
19 orient you.

20 Do you have your own approximation
21 of how many inmates have been considered for home
22 confinement during the period of time we're
23 talking about? Because you said you thought my
24 number was higher than yours.

25 MR. OESTERICH: Objection.

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1 A. Can you ask me that question again.

2 Q. Approximately how many inmates do
3 you believe have been considered for home
4 confinement since Attorney General Barr's memo by
5 the MCC?

6 A. I have absolutely no idea and the
7 reason I say your number is higher is because I
8 tried running I guess a data sheet that might
9 indicate what the numbers were. Because it's a
10 brand new process so as you know, a brand new
11 process sometimes takes a while to get going. And
12 I thought that number -- I think it was like a 3
13 on that number so I don't even know if I was
14 running the right thing, so that's why I'm saying
15 that number is just different than mine.

16 Q. Fair enough. Do you have any
17 factual base to say that this document that shows
18 117 people is wrong?

19 A. No.

20 Q. Is the MCC reviewing for potential
21 referral to home confinement all sentenced inmates
22 at the MCC currently other than inmates who were
23 there on a writ or have a detainer?

24 A. All inmates are being reviewed who
25 are BOP inmates.

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1 Q. Sentenced inmates; right?

2 A. Yes.

3 Q. Other than the writs or detainer
4 inmates, or are those being reviewed too?

5 A. We're not reviewing detainer
6 inmates because ordinarily when -- I'm sorry, writ
7 inmates, because again, you can look at it, but
8 that may be an individual who has a detainer and
9 they're not going to be eligible.

10 Q. So according to the information that
11 your lawyers are providing us, there have been 27
12 inmates who have been released since Attorney
13 General Barr's memos.

14 Do you know how many of those were
15 inmates for whom the MCC recommended release on
16 home confinement?

17 A. No, I do not know.

18 Q. You agree, do you not, that if an
19 inmate was released, that could happen a number of
20 different ways? For example, they could have been
21 released because they served out their sentence;
22 right?

23 A. Yes.

24 Q. Correct?

25 A. Yes.

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1 Q. They could have been released
2 because they made a request to a judge for
3 compassionate release that the judge granted on
4 their motion as opposed to the Bureau of Prisons'
5 motion; correct?

6 A. Correct.

7 Q. They could have been transferred to
8 another facility; correct?

9 A. Unlikely.

10 Q. Unlikely because of COVID-19 but
11 possible; right?

12 A. Possible.

13 Q. Or they could be released because
14 the MCC referred them for home confinement and
15 they were released on that basis; correct?

16 A. Correct.

17 Q. Just to be clear, do you have any
18 information as you sit here now as to how many of
19 those 27 inmates fall within the various
20 categories that I've just described?

21 A. No, none.

22 Q. Or when that happened, when those 27
23 were released?

24 A. No.

25 Q. So the information we were provided

1 by your lawyers is that 38 of those 117 inmates
2 were deemed to be ineligible for home confinement.
3 Do you have any basis to dispute factually that
4 number?

5 A. No.

6 Q. On this list were a number of the
7 people who are ineligible. Let me just direct you
8 to number 60. Do you see number 60?

9 A. Yes.

10 Q. It says "Primary or prior offense
11 includes violence, sex offense or
12 terrorism-related." Do you see that?

13 A. Yes.

14 Q. And do you know for that inmate
15 whether it was the primary offense or a prior
16 offense that rendered that inmate ineligible?

17 MR. OESTERICH: Objection.

18 A. I don't know.

19 Q. If I asked you the same questions
20 for every inmate on this list who has that
21 explanation for his ineligibility or her
22 ineligibility "Primary or prior offense includes
23 violence, sex offense or terrorism-related," would
24 you be able to tell me whether it was a primary
25 offense or the prior offense? Would you be able

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1 to tell me that?

2 A. No.

3 Q. Somewhere in the MCC, am I correct,
4 that is documented somewhere?

5 A. Yes.

6 Q. Are you aware that under -- you
7 mentioned the May 8th memo a few minutes ago.
8 Correct?

9 A. Yes.

10 Q. Am I correct that that is the latest
11 memo from the Bureau of Prisons dealing with the
12 topic of home confinement?

13 A. I believe so.

14 Q. The latest in a series of memos;
15 correct?

16 A. Yes.

17 Q. Are you aware that under the May 8th
18 memo, that the factor that is specified with
19 respect to offenses, it states that in determining
20 whether someone is eligible for home confinement,
21 you verify that their primary offense is not
22 violence, a sex offense or terrorism-related?

23 A. Yes.

24 Q. Are you aware that in that May 8th
25 memo, there is no reference to the inmate's prior

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1 offense being violence, a sex offense or
2 terrorism-related?

3 MR. OESTERICH: Objection.

4 A. Okay.

5 Q. You accept that?

6 A. Yes.

7 Q. Okay. So that under the May 8th
8 memo, am I correct that if an inmate has a prior
9 offense, not a primary, a prior offense for
10 violence, a sex offense or terrorism-related, that
11 is not a factor in rendering them ineligible for
12 home confinement? Would you agree with me?

13 MR. OESTERICH: Objection.

14 A. It is not a factor in the
15 memorandum, no.

16 Q. Was there any effort by the MCC to
17 look at the 38 inmates who are considered
18 ineligible based on primary or prior offense to
19 see whether any of them only had a prior offense
20 of the type described in the memo as opposed to a
21 primary one?

22 A. So when an inmate is reviewed for
23 home confinement or for halfway house, that review
24 is predominantly done by the case manager.

25 Q. Um-hum.

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1 A. In reference to if they approve or
2 deny, recommend or not, the inmate is notified and
3 the inmate has a right to file an administrative
4 remedy and appeal that decision.

5 **Q. Do you believe it would be**
6 **appropriate for the MCC to determine now if there**
7 **were inmates deemed ineligible for home**
8 **confinement referral because they had a prior**
9 **offense involving violence, sex offense or**
10 **terrorism-related, in light of the fact that the**
11 **May 8th memo does not speak about prior offenses**
12 **of that type?**

13 MR. OESTERICH: Objection.

14 A. I would say that the inmate's file
15 in its entirety has to be reviewed and I would
16 look at prior offenses to make a final
17 determination regardless of what this memo said.

18 **Q. But for inmates for whom the basis**
19 **for ineligibility was a prior offense of violence,**
20 **sex offense or terrorism-related, do you believe**
21 **it would be appropriate now, in light of the May**
22 **8th memo, to reassess them?**

23 MR. OESTERICH: Objection.

24 A. I would reassess the change of the
25 incident reports where we can now review inmates

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1 who have the 300 and 400 series incident reports,
2 and if they were denied because of that, I would
3 definitely review them to see if they were not
4 eligible due to that.

5 If there is a prior -- of some type
6 of a terrorism offense, I would have to review --
7 if I made that initial review, I don't think
8 anything changed.

9 Q. Well, isn't it a fact that the May
10 8th memo did change the Bureau's position in that
11 regard by no longer specifying prior offense?

12 A. I don't know if that was just
13 inadvertently left out or not.

14 Q. This is a memo from the assistant
15 director of the correctional program division;
16 correct? Withdrawn.

17 I mean, if you look at the memo and
18 you've seen them all, it's very clear the April
19 memos talk about primary or prior offense and the
20 May 8th memo says primary offense, right? That's
21 what the memos say, do they not?

22 MR. OESTERICH: Objection.

23 A. Okay, I'm not sure. I would have to
24 look at it.

25 Q. That's fine. No problem. Take a

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1 look at Exhibit 6 and Exhibit 9 and put them side
2 by side and let me know when you've had a chance
3 to do that. Warden, take the time you need, I'm
4 just trying to assist and tell you on April 22nd,
5 I'm focusing on the third bullet toward the bottom
6 of the page, and on the May 8th memo, again
7 focusing you on the third bullet towards the
8 bottom of the page. Do you see that?

9 A. I see it on the April 22nd,
10 "Verifying the inmate's primary or prior offense
11 history does not include violence, sex offense or
12 terrorism related."

13 Q. And now look at May 8th, the second
14 bullet on the page.

15 A. "Verifying the inmate's primary
16 offense is not violent, a sex offense or terrorism
17 related."

18 Q. It says nothing about "or prior";
19 correct?

20 A. Correct.

21 Q. That's the same memo, by the way,
22 the May 8th one, that has the change about 300 to
23 400, correct that those are no longer
24 disqualifiers; correct?

25 A. Correct.

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1 Q. Okay.

2 A. However -- disregard.

3 Q. Would it be reasonable to view the
4 inmates who we were told by your lawyers were
5 ineligible because of a primary or prior offense
6 as the reason for ineligibility, would it be
7 reasonable to reassess those to determine whether
8 it was solely based on a prior offense as opposed
9 to a primary offense in light of what the May 8th
10 memo says; yes or no?

11 MR. OESTERICH: Objection.

12 A. No, because the April 22nd memo,
13 where it says "past or present," when you read the
14 May 8th memo, it has in highlights the change for
15 the 300 and 400 series incident. However, it does
16 not highlight verifying the inmate's primary
17 offense, so that leads me to believe that that's
18 not a significant change they want us to look at,
19 because it is not bolded.

20 Q. Is that true for other changes in
21 the May 8th memo as compare to the April 22nd
22 memo? Because there's others. Are you telling me
23 the only change that is worthy of consideration is
24 the one that is in bold font in the May 8th memo?
25 Warden, is that your testimony?

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1 MR. OESTERICH: Objection.

2 A. My testimony is that it stands out.

3 Q. **My question was, is that the only**
4 **change?**

5 A. No, not the only change.

6 Q. **It's not the only change as between**
7 **the April 22nd and the May 8th memo that is worthy**
8 **of consideration; am I right?**

9 MR. OESTERICH: Objection.

10 Q. **Correct?**

11 A. I'm uncertain. I'm looking. I
12 think the May 8th memo also references pregnant
13 inmates.

14 Q. **And is that in bold font?**

15 A. It is not.

16 Q. **Does it deserve to be considered as**
17 **a change in policy?**

18 A. It does.

19 Q. **Going back to that chart, Exhibit 8,**
20 **some of the inmates for whom it states that they**
21 **were ineligible is for "recidivism score above**
22 **minimum." For example, number 16, number 61, some**
23 **others, do you see that?**

24 A. "Primary or prior offense includes
25 violence, sex offense, or

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1 terrorism-related/recidivism score above minimum, "
2 yes.

3 Q. Recidivism score above minimum, do
4 you agree with me that under the relevant Bureau
5 of Prisons guidance, including the May 8th memo,
6 that a score above minimum is not a
7 disqualification for home confinement; is it? I'm
8 referring you to the top of page 2 of the memo.

9 A. Which memo?

10 Q. The May 8th memo, which is Exhibit 9.

11 A. I've got the May 8th memo. Where
12 did you want me the look?

13 Q. I'm looking at the second bullet,
14 "Inmates who have anything above a Minimum score
15 not receiving priority treatment"; correct? Do
16 you see that?

17 A. "Inmates" -- I'm sorry. I'm just
18 reading aloud. I'll stop doing that.

19 Q. You can do it. Just speak clearly
20 when you do it.

21 A. Can you tell me exactly where on
22 page 2?

23 Q. I'm looking at the second bullet
24 toward the very top of the page; right? It says
25 the factors that are to be assessed to determine

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1 whether an inmate is suitable for home
2 confinement, and it says, "Inmates who have
3 anything above a Minimum score not receiving
4 priority treatment." Do you see that?

5 A. Yes.

6 Q. So in substance, if they have a
7 recidivism score above a minimum, they are not
8 supposed to be prioritized in terms of eligibility
9 for home confinement; correct?

10 A. Yes.

11 Q. But under the terms of this memo,
12 that fact, having a recidivism score above
13 minimum, is not a disqualifying feature; is it?

14 A. I don't believe it would be. It's
15 just something that is keeping them from being a
16 priority.

17 Q. But it doesn't render them
18 ineligible; does it?

19 A. I don't believe so. Not in
20 accordance with this memo.

21 Q. Also on that chart again, Exhibit 8,
22 some of the people for whom it's stated they were
23 ineligible, it says "percentage of time served."
24 For example, number 34. Do you see that?

25 A. Yes.

1 Q. Again, to be clear, the percentage
2 of time served is not a factor that would render
3 an inmate ineligible for home confinement
4 referral; am it right?

5 A. Percentage of time served, if you
6 look at the memo, I think it's May 8th --

7 Q. May 8, page 2, if I can help you,
8 Warden.

9 A. I'm on page 2. So this memo says
10 "have served 50 percent or more of their sentence,
11 or have 18 months or less remaining on their
12 sentence and they have served 25 percent or more
13 of their sentence."

14 Q. And right above that, am I correct
15 that it says the following: "We are currently
16 prioritizing for consideration those inmates who
17 either," and then it gives the information you
18 just testified to. Am I right?

19 A. Okay, yes.

20 Q. So those features, the 50 percent
21 and the 18 months and the 25 percent, those are
22 factors that would give an inmate priority in
23 terms of reviewing them for potential home
24 confinement referral; correct?

25 A. Yes.

1 Q. But the inmate who does not meet
2 those thresholds is not, under the terms of this
3 memo, rendered ineligible for home confinement
4 referral; are they?

5 A. I don't believe so.

6 Q. Some of the inmates listed as
7 ineligible on that chart, Exhibit 8, it refers to
8 gang affiliation. So, for example, number 96, do
9 you see that, gang affiliation?

10 A. 96, page 2?

11 Q. Yes.

12 A. Yes.

13 Q. Does that mean that they had a gang
14 affiliation out on the street, had a gang
15 affiliation in jail, somewhere else?

16 MR. OESTERICH: Objection.

17 Q. If you know.

18 A. I don't know.

19 Q. Am I correct that under the Bureau
20 of Prisons guidance, the factor with respect to
21 gang affiliation, that is included by in effect an
22 inmate having a gang affiliation in prison?

23 A. Can you repeat that?

24 Q. Yes. Is gang affiliation in prison,
25 gang-related activities in prison, isn't that the

1 factor that is included within the May 8th memo to
2 be considered in determining whether an inmate is
3 eligible for home confinement? I'm putting the
4 emphasis on gang activity in prison as opposed to
5 they were part of a gang outside on the street and
6 perhaps that's what they got prosecuted for. Am I
7 right about that?

8 A. I'm not sure.

9 Q. Why don't you take a look at the May
10 8th memo and look at the paragraph in the middle,
11 and tell me when you're ready. Right above where
12 that bold font type is that we spoke before --

13 A. So "All inmates must be reviewed by
14 the SIS department --

15 Q. -- at the referring facility to
16 determine if the inmate has engaged in violent or
17 gang-related activity in prison." Correct?

18 A. Yes.

19 Q. Do you know with respect to the
20 inmates who are on that chart whether it was gang
21 activity in prison that rendered them ineligible
22 according to your lawyers?

23 MR. OESTERICH: Objection.

24 A. I do not know.

25 MR. OESTERICH: Can we talk about

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1 MR. OESTERICH: Objection.

2 A. I'm not aware.

3 Q. Have you asked anybody for authority
4 or permission to utilize the First Step Act
5 standard as opposed to the 5050.50 standard in
6 determining whether to move for the release of an
7 inmate due to compassionate release?

8 A. I have not.

9 Q. Have you recommended the filing of a
10 motion for compassionate release of any inmate in
11 the institution since you've become the warden?

12 A. Say that one more time. I'm sorry.

13 Q. Since you became the warden of the
14 MCC, have you either moved or recommended the
15 filing of a motion by the Bureau of Prisons to
16 have an inmate released for compassionate release
17 reasons?

18 A. I don't think that we have. There
19 may have been one case where we didn't believe he
20 was eligible but because of his age, we went ahead
21 and we referred that to central office for their
22 final decision.

23 Q. Was that COVID-19-related or simply
24 age and had nothing to do with COVID-19?

25 A. COVID-19-related.

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1 A. Yes.

2 Q. You haven't delegated your authority
3 to anybody within the MCC; have you?

4 A. No, I have not.

5 Q. On those two issues, the buck stops
6 with you; right?

7 A. Yes.

8 Q. Again, do you know how quickly
9 people at the MCC are, in fact, reviewing,
10 responding to, pushing up the chain their
11 recommendations with respect to compassionate
12 release requests? Do you know?

13 A. In the three weeks that I have been
14 back, I have seen a lot of referrals even though
15 they were declinations. I've signed a lot of
16 those, so I can say that a lot of work has been
17 done in the last three weeks, yes.

18 Q. Do you know what, if any, work was
19 being done before that with respect to
20 compassionate release requests?

21 A. I wasn't here.

22 Q. And how about in March into early
23 April? Do you know how quickly that process was
24 working in terms of compassionate release
25 requests?

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1 A. It probably wasn't at all.

2 Q. Furloughs, are you familiar with the
3 Bureau of Prisons' policies and procedures with
4 respect to furloughs?

5 A. Yes.

6 Q. Have there been any change in the
7 MCC's policies or practices with regard to whether
8 to recommend the release of an inmate on a
9 furlough?

10 A. The process has not changed.

11 Q. Who makes the final decision on
12 behalf of the Bureau of Prisons on a furlough
13 release?

14 A. I do.

15 Q. Has a furlough been considered by
16 you at all as a means of responding to COVID-19?

17 A. I am open to reviewing furloughs as
18 a response to COVID-19. I haven't seen any
19 referrals.

20 Q. We've been told by your lawyers in
21 this case, again, in response to our written
22 requests for information, that there have been no
23 inmates that have been even considered for a
24 furlough since March 1st of 2020. Do you have any
25 basis to dispute that?

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1 forward, regardless of if it's COVID-related or
2 not. We've been under circumstances where it's
3 kind of held us up from doing so.

4 Certainly ideas of how we control
5 our chemicals in the units is one, and some of the
6 stuff we've actually implemented during COVID. We
7 actually have washers and driers in the units now
8 simply because it just helps us with ensuring that
9 their clothes get washed or the cleaning rags get
10 cleaned. Sometimes they could even put mops in
11 there to clean those.

12 Something that the nation is
13 probably looking at is more PPE.

14 **Q. What PPE?**

15 A. COVID. You know, we've had PPE
16 before I went out and after I came back. There
17 was never a point where oh, my goodness, we don't
18 have masks. We've always had them, but certainly
19 I would like to have more of a -- I guess like a
20 storage of everything that you could imagine just
21 to have ready for any possible future pandemics.

22 **Q. You mentioned chemicals in the**
23 **units. What were you referring to?**

24 A. I mean cleaning chemicals.

25 **Q. Got it. Fair enough. Anything**

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